University of Baltimore Law Review

Volume 8
Issue 2 *Winter 1979*

Article 6

1979

Comment: State and Local Legislative Powers: An Analysis of the Conflict and Preemption Doctrines in Maryland

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COMMENT

STATE AND LOCAL LEGISLATIVE POWERS: AN ANALYSIS OF THE CONFLICT AND PREEMPTION DOCTRINES IN MARYLAND

As local legislative powers expand, the demarcation between state and local legislative powers has become increasingly unclear. Purported inconsistencies between state and local laws have surfaced. This Comment analyzes the conflict and preemption doctrines in Maryland and synthesizes the general rules applicable to these doctrines. Concluding that the Court of Appeals of Maryland utilizes a rational approach in this area of municipal law, the author urges caution in employing implied preemption.

I. INTRODUCTION

As local governments exercise greater and more diverse powers, the boundaries between state and local legislative powers have become increasingly uncertain. Local laws may conflict with, or be preempted by, laws enacted by the state legislature. This Comment examines the express and implied legislative powers granted to Maryland chartered counties by Article 25A of the Maryland Annotated Code,[1] including recent interpretations of Article 25A by the Court of Appeals of Maryland that have expanded the legislative powers of chartered counties. This Comment then focuses on the conflict and preemption doctrines as applied by the court of appeals to state and local legislation in Maryland.

The charter[2] is the foundation of many local governments. Charters can be created either (1) by an act of the state legislature, or (2) by constitutional authority, independent of any act by the state legislature, whereby the voters petition and later adopt a charter.[3] A charter adopted pursuant to a state constitutional provision is referred to as a "home rule" charter.[4] Article XI-A of the Maryland Constitution[5] sets forth two procedures by which a Maryland county

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1. MD. ANN. CODE art. 25A, § 5 (1973).
2. A "charter" is a legislative or consititutional grant of power to a local governmental entity, including both cities and counties. 1 E. YOKLEY, MUNICIPAL CORPORATIONS § 38 (1956).
3. 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9.07 (3d ed. 1966) [hereinafter cited as MCQUILLIN].
4. 1 E. YOKLEY, MUNICIPAL CORPORATIONS § 38 (1956). Some constitutional provisions require the state legislature to "approve" the charter after its adoption by the voters. *See generally* 4 C. ANTIEAU, LOCAL GOVERNMENT LAW § 31.05 (1966); 56 AM. JUR.2d *Municipal Corporations* § 126 (1971).
5. MD. CONST. art. XI-A, §§ 1, 1A. Formation of a chartered county can be accomplished when a prescribed number of county voters sign a petition requesting the election of a charter board. Alternatively, the county commission-

can become chartered and thereafter exercise home rule.[6] A charter adopted pursuant to Article XI-A automatically becomes law,[7] and a chartered county has the full power to enact local laws subject to the Maryland Constitution and public general laws.[8]

II. LEGISLATIVE POWERS OF A CHARTERED COUNTY

A. Express Legislative Powers

By a constitutional mandate,[9] chartered counties in Maryland may exercise all express powers granted to them by the General Assembly.[10] Chartered counties are granted enumerated express powers[11] by Article 25A, which is referred to as the Express Powers Act.[12] The Express Powers Act confers a wide range of express powers on Maryland chartered counties, *e.g.*, to acquire, hold, and dispose of county property, to establish county institutions, to

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ers may appoint a charter board and subsequently call an election. Should a charter board be elected, it prepares a "charter or form of government." Following publication of the draft charter in newspapers of general circulation in the county, it is submitted to county voters for adoption.

6. Maryland counties that have adopted a charter pursuant to Article XI-A include the following: Anne Arundel, Baltimore, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico. Baltimore City is included within the provisions of Article XI-A and has also adopted a charter.

   Maryland counties may also adopt home rule under the "code procedure," although the powers granted to code counties are less than those granted to chartered counties. *See generally* MD. CONST. art. XI-F; MD. ANN. CODE art. 25B (1973); Moser, *County Home Rule — Sharing The State's Legislative Power With Maryland Counties,* 28 MD. L. REV. 327 (1968). For information concerning home rule cities, towns and villages in Maryland, *see generally* MD. CONST. art. XI-E; MD. ANN. CODE art. 23A (1973). For information concerning municipal home rule in other jurisdictions, *see generally* Brown, *Home Rule In Massachusetts: Municipal Freedom and Legislative Control,* 58 MASS. L.Q. 29 (1973); Howard, *Home Rule in Georgia: An Analysis of State and Local Power,* 9 GA. L. REV. 757 (1975); Scheidler, *Implementation of Constitutional Home Rule in Iowa,* 22 DRAKE L. REV. 294 (1973); Vaubel, *Municipal Home Rule in Ohio,* 3 OHIO N.U.I.L. REV. 1 (1975); 5 CREIGHTON L. REV. 98 (1971); 81 DICK. L. REV. 265 (1977); 41 MO. L. REV. 49 (1976); 22 SYRACUSE L. REV. 736 (1971); 16 WASHBURN L.J. 360 (1977).

7. MD. CONST. art. XI-A, § 1. The intent of Article XI-A is that "any new charter shall go into effect promptly after its ratification by the people." County Comm'rs for Montgomery County v. Supervisor of Elections of Montgomery County, 192 Md. 196, 209-10, 63 A.2d 735, 741 (1949). The charter "is entitled to the presumption of validity that is applicable to any law regularly adopted." *Id.* at 207, 63 A.2d at 740.

8. MD. CONST. art. XI-A, § 3. A public general law is a law enacted by the General Assembly applicable to two or more geographic subdivisions (counties) in the state. *See* MD. CONST. art. XI-A, § 4. For judicial definitions of "general law," *see generally* 2 MCQUILLIN, *supra* note 3, at § 4.44.

9. MD. CONST. art. XI-A, § 2.

10. The legislative power is based upon the statutory grant and "is not and never has been constitutionally secured." Ritchmount Partnership v. Board of Sup'rs of Elections for Anne Arundel County, 283 Md. 48, 58, 388 A.2d 523, 530 (1978).

11. MD. ANN. CODE art. 25A, § 4 (1973).

12. County Comm'rs for Montgomery County v. Supervisors of Elections of Montgomery County, 192 Md. 196, 204, 63 A.2d 735, 739 (1949).

contract, to zone and plan, to waive its sovereign immunity, and to levy taxes.[13] One of the most important express powers is the power to "enact local laws for [the] county, including the power to repeal or amend local laws . . . enacted by the General Assembly upon the matters covered by the express powers . . . ."[14] Although a chartered county is given "full power" to enact local laws,[15] it is prohibited from enacting laws or regulations for any incorporated town, village, or municipality.[16]

The General Assembly is prohibited from enacting a public local law[17] on any subject covered by the enumerated express powers granted to chartered counties.[18] The express powers may be "extended, modified, amended or repealed" by the General Assembly,[19] but not by a public local law. In *State v. Stewart,*[20] the court of appeals extensively discussed the rationale for this prohibition:

> If the General Assembly, in its grant of powers to [chartered counties], subsequently concludes that the grant of powers contained a subject upon which the General Assembly should have authority to legislate, and not the [county] authorities, it can only accomplish this by amending or repealing the act granting and delineating the powers. The Legislature has the power to describe the field within which the local authorities may legislate, but, having once done this, it cannot restrict or limit this field of legislation . . . so long as the grant of powers remain[s] unchanged. Any other interpretation would render the provisions of article 11A meaningless, and result in nullifying the purpose sought to be accomplished by its adoption. If the Legislature could change the grant of power by the simple expedient of

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13. MD. ANN. CODE art. 25A, §§ 5(A)-5(CC) (1973 & Supp. 1978).
14. Chartered counties are vested with the power
> [t]o enact local laws for such county, including the power to repeal or amend local laws thereof enacted by the General Assembly upon the matters covered by the express powers in this article granted; to provide for the enforcement of all ordinances, resolutions, bylaws and regulations adopted under the authority of this article by fines, penalties and imprisonment, enforceable according to law as may be prescribed, but no such fine or penalty shall exceed $1,000.00 for any offense or imprisonment for more than six months.

MD. ANN. CODE art. 25A, § 5(A) (1973).
15. For the purposes of this Comment, a local law is defined as legislation enacted by the legislative body of a chartered county, known as the "county council." Other definitions are discussed in 2 McQUILLIN, *supra* note 3, at § 4.48.
16. MD. CONST. art. XI-A, § 3.
17. A public local law is a law enacted by the General Assembly applicable to only one geographic subdivision (county) in the state. *See* MD. CONST. art. XI-A, § 4.
18. MD. CONST. art. XI-A, § 4. *See generally* 2 McQUILLIN, *supra* note 3, at §§ 4.28-4.29; 56 AM. JUR.2d *Municipal Corporations* § 128 (1971).
19. MD. CONST. art. XI-A, § 2. *See generally* 6 McQUILLIN, *supra* note 3, at § 21.28.
20. 152 Md. 419, 137 A. 39 (1927).

> passing an act in conflict with the legislation of local authorities, it would result in the complete frustration of the object of the amendment.[21]

Although the General Assembly is prohibited from enacting public local laws inconsistent with the express powers, it may enact public general laws inconsistent with those powers.[22]

B. Implied Legislative Powers

Chartered counties are granted a wide range of enumerated express powers; the broadest authority for local legislation exists in section 5(S) of Article 25A,[23] known as a general welfare clause.[24] Section 5(S) confers the following additional power on chartered counties:

> The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in

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21. *Id.* at 424, 137 A. at 41-42. *See generally* 6 MCQUILLIN, *supra* note 3, at § 21.33.
22. The court of appeals in State's Attorney of Baltimore City v. City of Baltimore, 274 Md. 597, 337 A.2d 92 (1975), recognized this power to enact public general laws inconsistent with the express powers of chartered counties:

> Under Art. XI-A, § 4, of the Maryland Constitution, the General Assembly may enact legislation inconsistent with the express powers it had previously granted to Baltimore City or to the charter counties if it does so by *public general law.* The restriction upon the authority of the General Assembly in § 4 of Art. XI-A relates to the enactment of *public local laws* only.

Id. at 606, 337 A.2d at 98 (emphasis in original).

There is no cogent reason to differentiate between public general and public local laws that are inconsistent with the express powers granted to chartered counties. While it is true that Article XI-A, § 4 only prohibits the General Assembly from enacting public local laws on matters covered by the grant of express powers, a public general law should not be any more inconsistent with the express powers than a public local law. The primary source of a chartered county's legislative powers is Article 25A. Uncertainty as to legislative power necessarily results when Article 25A appears to grant a particular power and a public general law, on the other hand, removes such power because of inconsistency. As indicated in State v. Stewart, 152 Md. 419, 137 A. 39 (1927), the General Assembly should amend Article 25A in any case where the express powers are to be altered, modified or rescinded.

For a discussion as to local legislation masquerading as a "general law," see Moser, *County Home Rule — Sharing The State's Legislative Power With Maryland Counties,* 28 MD. L. REV. 327, 342 (1968).

23. MD. ANN. CODE art. 25A, § 5(S) (1973).
24. Montgomery Citizens League v. Greenhalgh, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). A general welfare clause is "[a] grant of power to pass laws for the peace, good government, health and welfare of the community." *Id. See generally* 2 MCQUILLIN, *supra* note 3, at § 10.24.

> this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.[25]

Section 5(S), although listed among the enumerated express powers, can be considered an implied power because the language used is general and broad, and does not grant power to chartered counties over a particular topic or in a particular field, as do other enumerated express powers in Article 25A.

The court of appeals, in the landmark 1969 case of *Montgomery Citizens League v. Greenhalgh*,[26] examined the previously unrecognized grant of power in section 5(S).[27] The court determined that the purpose behind home rule required a broad interpretation of that section.[28] The court implicitly rejected "Dillon's Rule,"[29] which narrowly construes grants of power to municipalities, and concluded

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25. MD. ANN. CODE art. 25A, § 5(S) (1973).
26. 253 Md. 151, 252 A.2d 242 (1969). In *Greenhalgh,* the Montgomery County Council enacted an ordinance that prohibited discrimination on the basis of color, religious creed, ancestry, or national origin in the sale or rental of housing. The ordinance was challenged on the ground that the legislative powers granted to the county by Article 25A did not embrace the power to pass a fair housing law.
27. Section 5(S) is inconspicuously listed under the title "Amendment of County Charter."
28. The court stated in this regard:
> Gratification would not be afforded the purposes of home rule or the reasons which prompted it if the language of § 5(S) of Art. 25A were not to be construed as a broad grant of power to legislate on matters not specifically enumerated in Art. 25A and the language of that section clearly indicates that such a construction is sound.

253 Md. at 160–61, 252 A.2d at 247.
29. Dillon's Rule narrowly interprets the powers of a municipal corporation:
> [A] municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*: second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

J. DILLON, MUNICIPAL CORPORATIONS § 55 (1872) (emphasis in original). The court of appeals adopted a broad interpretation of § 5(S) because it is a "general welfare clause" and this type of clause is usually subject to a broad interpretation. *Compare* 6 McQUILLIN, *supra* note 3, at §§ 24.43–.45 *with* 4 C. ANTIEAU, LOCAL GOVERNMENT LAW § 31.06 (1966). In this regard, the court found application of Dillon's Rule inconsistent with the language of § 5(S):
> [A] number of courts have taken the view that a general grant of power to a municipal corporation authorizes only the carrying out of the specific powers delegated to it, but even if it be assumed that such a point of view is sound in the abstract the language of § 5(S) negates the idea that this was its intent, for not only does it empower legislative action designed to carry out, exercise and implement enumerated powers, it goes further to add that power is given "as well" to ordain for the maintenance of peace, good government, health and welfare of the County.

253 Md. at 161, 252 A.2d at 247.

that "[t]he broadest grant of powers customarily is to home rule Counties, . . . and cases holding that a delegation was restricted or narrow are concerned almost always with delegations to municipalities that do not enjoy home rule."[30]

This broad interpretation of section 5(S) is sufficient to sustain a variety of local laws. For example, the court of appeals in *County Council for Montgomery County v. Investors Funding Corp.*[31] upheld a county ordinance regulating the apartment rental business and landlord-tenant relationships:

> Our recognition in *Greenhalgh* of the expansive nature of the legislative powers conferred upon the Council by Article 25A, § 5(S), coupled with our holding that, pursuant to such power, the Council could enact a fair housing law prohibiting racial and religious discrimination in the sale or rental of housing in the County is, we think, clear authority for the lower court's ruling that the Council was empowered to enact local legislation regulatory of the apartment rental business and landlord-tenant relationships in Montgomery County.[32]

Greenhalgh's characterization of section 5(S), together with the holding in *Investors Funding,* indicated that section 5(S) was tantamount to the police power, or was at least indistinguishable from it; subsequently, the court expressly stated that section 5(S) is a grant of police powers to chartered counties.[33]

Section 5(S), as a police power or general welfare clause, furnishes a basis for upholding local laws regarding the regulation of private businesses,[34] including taxicab stands,[35] and rents and housing.[36] Although an early case appeared to be authority for the proposition that Sunday closing laws were within the power granted

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30. 253 Md. at 162, 252 A.2d at 247. The majority in *Greenhalgh* upheld the ordinance, stating that "[a] fair housing or equal accommodation law currently must prima facie be regarded as a reasonable exercise in good faith of the police power to protect the peace and good order of the community and to promote its welfare and good govenment." *Id.*

    Judge Barnes dissented, arguing that the power to pass an anti-discrimination ordinance was not explicitly enumerated in Article 25A, § 5. He concluded that § 5(S) was distinguishable from "the *full grant* of the State's police power as was given to the Mayor and City Council of Baltimore by the General Assembly . . . ." 253 Md. at 176, 252 A.2d at 255 (emphasis in original).
31. 270 Md. 403, 312 A.2d 225 (1973).
32. *Id.* at 415, 312 A.2d at 232 (citations omitted).
33. *See* Prince George's County v. Chillum-Adelphi Fire Dep't, Inc., 275 Md. 374, 382, 340 A.2d 265, 270 (1965).
34. *See id.*
35. *Cf.* G.I. Veterans' Taxicab Ass'n v. Yellow Cab Co., 192 Md. 551, 65 A.2d 173 (1949) (police power contained in Baltimore City Charter).
36. *Cf.* Heubeck v. City of Baltimore, 205 Md. 203, 107 A.2d 99 (1954) (police power contained in Baltimore City Charter).

to Baltimore City,[37] the court of appeals has recently held that the power to regulate Sunday closings was not within the power delegated to chartered counties by section 5(S).[38]

An additional implied power conferred upon chartered counties is the power to alter the common law. The court of appeals in *County Council for Montgomery County v. Investors Funding Corp.*[39] stated that "implicit within the grant of 'full power' to chartered counties contained in § 3 of Article XI-A"[40] is the power to alter, revise or amend the English common law within the matters covered by Article 25A's express powers. The court reasoned that the underlying purpose of Article XI-A is to share the General Assembly's legislative powers with chartered counties. The court noted that the English common law "undoubtedly impinges on many areas . . . recognized by the Express Powers Act as proper subjects of local legislation."[41] Therefore, the court concluded, if chartered counties possess the power to enact local legislation, but lack any power to revise the common law, then "local legislation which necessitate[s] any revision of the common law would be impossible."[42]

III. PUBLIC GENERAL LAWS AND LOCAL LAWS: THE CONFLICT AND PREEMPTION DOCTRINES

A. *The Conflict Doctrine*

Article XI-A, also known as the Home Rule Amendment,[43] was ratified in 1915 and exclusively confines the power to pass local laws[44] to local authorities, prohibiting its further exercise by the General Assembly.[45] After adoption of its charter, a chartered county is entitled to exercise the express and implied powers granted by Article 25A.[46] The ability of local authorities in Maryland to legislate in an area concurrently with the General Assembly is derived from *Rossberg v. State,*[47] which was decided prior to ratification of Article

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37. *See* Ness v. Ennis, 162 Md. 529, 160 A. 8 (1932).
38. Steimel v. Board of Election Sup'rs of Prince George's County, 278 Md. 1, 357 A.2d 386 (1976). The court reasoned in *Steimel* that the long history of Sunday closing legislation enacted by the General Assembly on a public local law basis and the absence of such legislation by local authorities indicated the General Assembly's intent not to grant legislative power in the field to chartered counties.
39. 270 Md. 403, 312 A.2d 225 (1973).
40. *Id.* at 418, 312 A.2d at 234.
41. *Id.* at 418, 312 A.2d at 233.
42. *Id.* at 418, 312 A.2d at 234.
43. State v. Stewart, 152 Md. 419, 422, 137 A. 39, 41 (1927).
44. For the definition of "local law," see note 16 *supra.*
45. Schneider v. Lansdale, 191 Md. 317, 326, 61 A.2d 671, 675 (1948). *See generally* 2 McQUILLIN, *supra* note 3, at § 9.08.
46. *See generally* Part II *supra.*
47. 111 Md. 394, 74 A. 581 (1909). *See generally* 6 McQUILLIN, *supra* note 3, at § 21.32.

XI-A. In *Rossberg* a public general law prohibited the sale of cocaine, whereas a Baltimore City ordinance prohibited possession as well and, in addition, imposed more stringent penalties. Upholding the local law, the court of appeals established the concurrent power doctrine. According to the doctrine, if a municipality is granted a particular legislative power, then that power may be exercised concurrently with the General Assembly.[48]

When a chartered county exercises its concurrent legislative powers, the possibility arises that local legislation may be inconsistent with *public general laws*[49] enacted by the General Assembly. Inconsistency which amounts to conflict may cause the court of appeals to invalidate the local legislation. Any conflict between a public general law and a *public local law*[50] is resolved in favor of the public local law.[51] Any conflict between a public general law and a *local law*,[52] however, is resolved in favor of the public general law:

> All . . . local laws enacted by . . . the Council of the Counties . . ., shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that in case of any conflict between [the] local law and any Public General Law now or hereafter enacted the Public General Law shall control.[53]

Although statement of the general rule in Article XI-A causes little dissension, controversies usually arise as to the definition of "conflict" and application of that definition to particular public general laws and local laws. Provided there is no conflict within the meaning of Article XI-A, local legislation may be sustained even though it regulates the same object as does a public general law.

Although Article XI-A does not define "conflict," the court of appeals in *Rossberg* enunciated a general rule to determine when conflict in fact exists:

> [*F*]*urther and additional penalties* may be imposed by ordinance, without creating inconsistency. The true doctrine, in our opinion, is concisely stated . . . as follows: '[local laws] must not directly or indirectly contravene the general

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48. The court laid the basis for the concurrent power doctrine: "[i]t follows from what we have thus far said that municipal authorities may be given concurrent power with the state to punish certain classes of offenses." 111 Md. at 415-16, 74 A. at 584.
49. For the definition of a "public general law," see note 8 *supra*.
50. For the definition of a "public local law," see note 17 *supra*.
51. MD. ANN. CODE art. 1, § 13 (1976).
52. For the definition of "local law," see note 15 *supra*.
53. MD. CONST. art. XI-A, § 3. *See generally* 6 MCQUILLIN, *supra* note 3, at § 21.32; 4 C. ANTIEAU, LOCAL GOVERNMENT LAW § 31.05 (1966); 56 AM. JUR.2d *Municipal Corporations* § 374 (1971).

> law. Hence ordinances which assume directly or indirectly to permit acts or occupations which the [public general laws] prohibit, or to prohibit acts permitted by [public general law] or constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void. Additional regulation by the ordinance does not render it void.'[54]

While subsequent cases decided under the *Rossberg* conflict rule may appear to be incongruous, there is harmony in the court's decisions. An analysis of the conflict rule reveals that there may be two tests, which employ different analytical techniques, to determine whether a conflict exists between a public general law and a local law. These tests may be labeled as the verbal test and the functional test.

An analysis using the verbal test focuses on the terms and coverage of the disputed laws; under the functional test the analysis focuses on the functional impact of the local law upon the public general law's operation and purposes. Under the verbal test, if the language or provisions of the local law prohibit conduct permitted by the public general law, or if the local law permits conduct prohibited by the language or provisions of the public general law, then a verbal conflict exists and the local law is invalid. For example, in *Heubeck v. City of Baltimore,*[55] a municipal ordinance prohibited landlords under certain circumstances from evicting tenants upon the expiration of their leases. A public general law, however, provided for the eviction of tenants holding over at the expiration of their terms. Since the local law prohibited conduct, the eviction of holdover tenants, which the public general law permitted, it was in verbal conflict and consequently invalid.[56]

Unlike the analytical technique employed under the verbal test, determination of conflict under the functional test requires an analysis of the public general law's function or purpose. If the local law is in furtherance of the public general law's function, then the local law is valid without regard to any verbal conflict. The first case illustrating a functional application of the *Rossberg* conflict rule was *State v. Brown.*[57] In *Brown,* a public general law required all motor vehicles to yield the right of way to other vehicles approaching from the right. A local ordinance, however, exempted vehicles such as

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54. 111 Md. at 416-17, 74 A. at 584 (emphasis in original; citations omitted). *See generally* 56 AM. JUR.2d *Municipal Corporations* § 374 (1971).
55. 205 Md. 203, 107 A.2d 99 (1954).
56. Another example of the application of the verbal test is Levering v. Williams, 134 Md. 48, 106 A. 176 (1919). In *Levering,* the public general law prohibited all work on Sunday; the local ordinance, however, allowed professionals to play sports on Sunday. Since the local law permitted conduct that the public general law prohibited, it was invalidated pursuant to *Rossberg's* conflict rule.
57. 142 Md. 27, 119 A. 684 (1922).

ambulances from this requirement. Application of the verbal test would have invalidated the ordinance since it permitted an act, the failure to yield the right of way, which the public general law prohibited. The functional test, on the other hand, explains the court's decision to uphold the local law. Presumably, the purpose or function of the public general law was to promote traffic safety. The local law did not counter this function; in fact, it furthered the function of the public general law by exempting only emergency vehicles, which necessarily require the right of way.[58]

Perhaps the clearest illustration of the functional test taking priority over the verbal test under the conflict rule is *City of Baltimore v. Sitnick.*[59] In *Sitnick,* a local law was enacted to establish minimum wages. Subsequently, the General Assembly enacted a public general law that also established minimum wages. The local law, but not the public general law, applied to taverns. In addition, although hotels were included in both laws, the local law required a minimum wage of $1.25 per hour, as opposed to the $1.00 per hour minimum wage mandated by the state law for hotel employees. The verbal test would have invalidated the local law since it prohibited conduct, payment of less than $1.25 per hour, which the public general law permitted. Moreover, although the public general law was inapplicable to taverns, the local law required payment of a minimum wage to tavern employees.

The court of appeals upheld the local minimum wage law and used language indicating application of the functional test.[60] The purpose or function of the public general law was to prohibit the payment of substandard wages and to maintain a certain standard

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58. Although the court in *Brown* appears to have upheld the local law solely upon a police power theory, implicit in the decision was an application of the functional test: "it was not the purpose of the municipality to derogate in any respect from the general rule laid down by the Legislature . . . ." *Id.* at 30, 119 A. at 685.

    Other cases illustrate application of the functional test. *E.g.,* American Nat'l Bldg. & Loan Ass'n v. City of Baltimore, 245 Md. 23, 224 A.2d 883 (1966); Eastern Tar Prod. Corp. v. State Tax Comm'n, 176 Md. 290, 4 A.2d 462 (1939). The local law in *American National* imposed a tax on savings and loan associations for the privilege of doing business within the county. This law, it was argued, conflicted with a public general law imposing a franchise tax on such associations. Since the function of the public general law was regulatory, and the function of the local law was to derive revenue, the court of appeals upheld the local law.

59. 254 Md. 303, 255 A.2d 376 (1969).

60. The court implicitly recognized the functional test:

    > It is obvious that the Legislature by retaining the power to modify, amend or repeal a provision of a municipal charter and by preserving the dominance of a public general law over local ordinances in an area where conflict may exist . . . , intended that there be a functional interplay between State and local legislation. There have been times when this has not lent itself to easy solution, although the existence and exercise of "concurrent power" has been recognized with some frequency.

    Id. at 312, 255 A.2d at 380 (citation and footnote omitted).

of living. Conditions peculiar to a municipality may justify additional local regulation by setting a higher minimum wage.[61] The local law in *Sitnick* was enacted by the Mayor and City Council of Baltimore; presumably, Baltimore City established a higher minimum wage to compensate for the higher cost of urban living. The local law, therefore, furthered the purpose of the public general law.

According to the court in *Sitnick,* unless a public general law denies legislative authority in a particular field to chartered counties, they may enact "supplemental" local legislation.[62] The word "supplemental" refers to the ability of chartered counties to legislate in furtherance of a public general law's function.[63] The court declared that an exemption created by a public general law "amounts to no regulation at all and accordingly leaves the field open for regulation at the local level."[64]

Rather than distinguishing between the two different applications of the conflict rule, the verbal and functional tests,[65] the *Sitnick* court redefined the language of the *Rossberg* conflict rule to justify upholding the local law:

> A distillation of the opinions we have cited leaves the residual thought that a political subdivision may not prohibit what the State by public general law has permitted, but it may prohibit what the State has not *expressly* permitted. Stated another way, unless a public general law contains an express denial of the right to act by local

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61. See Moser, *County Home Rule — Sharing The State's Legislative Power With Maryland Counties,* 28 MD. L. REV. 327, 350 n.79 (1968).
62. 254 Md. at 317, 255 A.2d at 382.
63. According to the court, the absence of state regulation allows local regulation:
> We do not think in this case that the exemption from State regulation, unaccompanied by any prohibition against inclusion in local regulation, was an affirmative guarantee against local regulation. Furthermore, to adopt a contrary rule in this instance would create the anomalous situation whereby the City's concurrent power to regulate would become operative only in the event that the State set a minimum standard which the City would supplement.

Id. at 324, 255 A.2d at 386. If there is no public general law, the local law is not "supplementation" because it does not further a function expressed in state legislation. *See* County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 420, 312 A.2d 225, 235 (1973), in which the court of appeals distinguished *Sitnick* as follows:
> The situation before us, unlike *Sitnick* . . . does not involve the direct conflict inherent in a dual regulatory scheme, since in the instant case, Montgomery County has attempted to comprehensively regulate the apartment rental business and landlord-tenant affairs, but the State has not. The theory of permissible "supplementation" of State law by local ordinance is, therefore, inapposite.

64. 254 Md. at 324, 255 A.2d at 385–86.
65. Application of the verbal test is often ritualistic and mechanical. *E.g.,* Wholesale Laundry Bd. of Trade v. New York State Restaurant Ass'n, 17 App. Div.2d 327, 234 N.Y.S.2d 862 (1962), *aff'd mem.,* 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963).

> authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation.[66]

Although upholding the local law based upon an analysis under the functional test, the court redefined the conflict rule in such a way as to alter the verbal test. The *Rossberg* conflict rule invalidated local laws if they "prohibit[ed] acts permitted by statute."[67] Thus, local laws were invalid if they prohibited acts impliedly permitted by public general law. Under *Sitnick,* however, local legislation is valid unless it prohibits acts *expressly* permitted by public general law. The court has applied the verbal test after *Sitnick's* redefinition of the *Rossberg* conflict rule.[68]

Only a few general statements can be made about *Rossberg* and its progeny. The *Rossberg-Sitnick* conflict rule only applies to a purported conflict between public general laws and local laws; a county charter is considered the same as a local law.[69] The court of appeals has refused to extend the rule to alleged conflicts between public general and public local laws.[70] This refusal is mandated by the language of Article XI-A, which refers only to "any conflict between [a] local law and any Public General Law."[71] Any conflict between a public general law and a local law must be direct, not inferential, and derived from the very language of the disputed

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66. 254 Md. at 317, 255 A.2d at 382 (emphasis in original).
67. Rossberg v. State, 111 Md. 394, 416, 74 A. 581, 584 (1909).
68. *E.g.,* County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973), in which a chartered county's ordinance that comprehensively regulated the apartment rental business and landlord-tenant relationships was attacked as conflicting with numerous public general laws. One provision of the ordinance required execution of leases in duplicate and copies given to the tenants; a public general law permitted oral leases. Citing *Sitnick,* the court invalidated the provision because it prohibited an act expressly permitted by public general law.
69. *See* Wilson v. Board of Sup'rs of Elections of Baltimore City, 273 Md. 296, 328 A.2d 305 (1974).
70. *See* Vermont Fed. Sav. & Loan Ass'n v. Wicomico County, 263 Md. 178, 283 A.2d 384 (1971). The public general law in *Vermont Federal* provided that unpaid real estate taxes constituted a lien on the real estate, while the law was silent as to unpaid personal property taxes. A public local law, however, established a lien on real estate for both unpaid real and personal property taxes. The court of appeals rejected the argument that a fatal conflict existed between the two laws, stating that "[i]n the instant case, where both the Public General Law and Public Local Law are enactments of the same legislative body, the General Assembly, the rationalization that the Public Local Law is legislation of a supplemental nature, rather than a conflicting enactment, is all the more persuasive." *Id.* at 184, 283 A.2d at 388.
71. MD. CONST. art. XI-A, § 3. In addition, the court is also prohibited from doing so by MD. ANN. CODE art. 1, § 13 (1976), which provides that any conflict between a public general law and a public local law is resolved in favor of the public local law.

laws.[72] Finally, the court of appeals has avoided the conflict issue altogether by using strained statutory construction to uphold local laws.[73]

B. The Preemption Doctrine

In cases involving a purported clash between a public general law and a local law, the court of appeals is usually faced with arguments based not only upon conflict, but also upon express and implied preemption.[74] Although some cases have confused conflict and preemption,[75] they are distinct concepts.[76] Express preemption involves the explicit denial of legislative power over a particular subject matter[77] and is infrequently applied. Implied preemption, however, has been applied with greater frequency in Maryland. Implied preemption prohibits local laws in a particular field[78]

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72. *See* County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973); American Nat'l Bldg. & Loan Ass'n v. City of Baltimore, 245 Md. 23, 224 A.2d 883 (1966). *But see* Board of Appeals of Montgomery County v. Marina Apartments, 272 Md. 691, 326 A.2d 734 (1974).
73. *See* Wilson v. Board of Sup'rs of Elections of Baltimore City, 273 Md. 296, 328 A.2d 305 (1974). *But see* Abbott v. Administrative Hearing Bd., 33 Md. App. 681, 366 A.2d 756 (1976). A classic example of the court's use of statutory construction to avoid the conflict issue is *Wilson*. The public general law there authorized construction of a new sports stadium in Baltimore City; money could be borrowed from any governmental entity for this purpose. A proposed Baltimore City charter amendment, however, prohibited construction of a new stadium within the city with public funds. The local laws prohibited an act, the use of public funds, which the public general law expressly permitted, the borrowing of money from any governmental entity. Rather than striking the proposed amendment under *Sitnick*, the court of appeals concluded that it only prohibited construction of a stadium in the city with *city* funds. But even this exercise in statutory construction failed to remove a fatal conflict; the dissent in *Wilson* cogently argued that the local law prohibited what the public general law expressly permitted. 273 Md. at 305, 328 A.2d at 311 (Murphy, C.J., dissenting). The local law still prohibited an act, the borrowing of Baltimore City funds, which the public general law expressly permitted, the borrowing of funds from *any* governmental entity.

    The court of special appeals in *Abbott* could have used statutory construction to harmonize the public general and local laws. This was possible by holding that the public general law was qualified by the implicit condition that administrative appeals were applicable, if so provided by local law, prior to an appeal to the circuit court. *See* Billig v. State, 157 Md. 185, 145 A. 492 (1929). Instead, the court struck the local law as conflicting with the public general law.
74. *See, e.g.*, County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975).
75. *See, e.g.*, Galvan v. Superior Ct. of City and County of San Francisco, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).
76. Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 356, 143 N.W.2d 813, 819 (1966).
77. *See* City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 376 (1969).
78. A legislative "field" may be defined as "an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court or a local legislative body, can detect a patterned approach to the subject." Galvan v. Superior Ct. of City and County of San Francisco, 70 Cal. 2d 851, 862, 452 P.2d 930, 937, 76 Cal. Rptr. 642, 649 (1969).

because the court of appeals has inferred an intent on the part of the General Assembly to occupy exclusively the field. Implied preemption has been applied to prohibit local legislation in the fields of education and campaign finances in Maryland,[79] as well as in other states.[80]

Although the court of appeals rejected implied preemption arguments in a few cases[81] without discussion, it was not until *City of Baltimore v. Sitnick*[82] that the doctrine was discussed in any detail. The city ordinance there was attacked on the two grounds that it conflicted with, and was preempted by, the public general law. The court sustained the ordinance under the conflict rule. Nevertheless, in dictum, the court laid the basis for the implied preemption doctrine:

> Before leaving the discussion of the concept of "pre-emption" in the field by occupation, as contrasted with the "concurrent power" theory, we wish it understood that there may be times when the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled . . . .[83]

The court of appeals first applied the preemption doctrine in *County Council for Montgomery County v. Montgomery Association.*[84] The Montgomery County Council had enacted three ordinances regulating campaign finance practices of political candidates in the county. Although the county argued that the ordinances were valid under the concurrent power doctrine, they were invalidated because the court of appeals found that the field regulating election

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79. *E.g.,* McCarthy v. Board of Educ. of Anne Arundel County, 280 Md. 634, 374 A.2d 1135 (1977) (education); County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975) (regulation of election finances).
80. *E.g.,* Lancaster v. Municipal Ct. for Beverly Hills, 6 Cal.3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972) (criminal aspects of sexual activity); Anamizu v. City and County of Honolulu, 52 Haw. 550, 481 P.2d 116 (1971) (licensing of electrical contractors); People v. Llewellyn, 401 Mich. 314, 257 N.W.2d 902 (1977) (definition and prohibition of obscenity); Overlook Terrace Management Corp. v. Rent Control Bd. of Town of West New York, 71 N.J. 451, 366 A.2d 321 (1976) (rent controls); Robin v. Incorporated Village of Hempstead, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972) (abortions and practice of medicine); Wholesale Laundry Bd. of Trade v. New York State Restaurant Ass'n, 17 App. Div.2d 327, 234 N.Y.S.2d 862 (1962), *aff'd mem.,* 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963) (minimum wages).
81. *E.g.,* American Nat'l Bldg. & Loan Ass'n v. City of Baltimore, 245 Md. 23, 30, 224 A.2d 883, 886 (1966); Heubeck v. City of Baltimore, 205 Md. 203, 207, 107 A.2d 99, 102 (1954).
82. 254 Md. 303, 255 A.2d 376 (1969); see text accompanying notes 59-68.
83. *Id.* at 322-23, 255 A.2d at 385. *See generally* 4 C. ANTIEAU, LOCAL GOVERNMENT LAW § 31.09 (1966).
84. 274 Md. 52, 333 A.2d 596 (1975), *noted in* 35 MD. L. REV. 542 (1976).

finances was impliedly preempted by occupation.[85] There were numerous factors influencing the court in *Montgomery Association.* The court considered provisions of the Maryland Constitution that vested authority in the General Assembly to regulate the manner of holding elections. These provisions, the court concluded, demonstrated an intent to confine regulation of elections exclusively to the General Assembly.[86] In addition, public general laws enacted pursuant to the constitutional mandate "contain[ed] provisions covering every aspect of the electoral process in Maryland."[87] Also highly relevant to the court's determination regarding occupation of the field were acts passed by the General Assembly providing for administrative supervision of elections throughout the state, particularly on a local level.[88] Finally, the possible chaos engendered by a dual regulatory scheme convinced the court that only public general laws were intended to occupy the field.[89]

Recently, the court of appeals again applied the preemption doctrine in *McCarthy v. Board of Education of Anne Arundel County.*[90] There, the court held that the field of education was impliedly preempted by occupation of public general laws so as to preclude local legislation regarding transportation of children attending private schools. The court reviewed constitutional provisions that directed the General Assembly to establish a public school system throughout the state. The public general laws enacted pursuant to this constitutional directive established and comprehensively implemented a public school system. The court concluded that the extensive "legislation by the State in the field of education demonstrates the occupation of that field by the State."[91]

C. Synthesis

The various Maryland cases discussing or applying concurrent power, conflict and preemption may appear to be incongruous. A close analysis of these decisions, however, reveals not only consistency but also a rational approach to municipal law in Maryland. The general rules applicable to purported inconsistencies

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85. The court reasoned that "[t]he General Assembly has so forcibly expressed its intent to occupy the field of regulating election finances that an intent to preclude local legislation in that field must be inferred." *Id.* at 60, 333 A.2d at 600.
86. *Id.* at 60, 333 A.2d at 601.
87. *Id.* at 61, 333 A.2d at 601.
88. *Id.*
89. *Id.* at 64, 333 A.2d at 602.
90. 280 Md. 634, 374 A.2d 1135 (1977).
91. *Id.* at 651, 374 A.2d at 1144.

between public general laws and local laws may be synthesized as follows:

1. *Exclusive State Concern*: Local laws are prohibited when their subject matter involves a matter exclusively of state concern.[92]

2. *Concurrent Power*: Provided there is sufficient legislative power, local laws may regulate a field concurrently with public general laws[93] unless there is:

   a. *Conflict*: A conflict between a public general law and a local law may take either of the following forms:

      1.) *Verbal Conflict*: Conflict exists if the language or provisions of the local law prohibit conduct permitted by the public general law, or if the local law permits conduct prohibited by the language or provisions of the public general law;[94] or

      2.) *Functional Conflict*: Conflict exists when the local law impedes the purpose or function of the public general law.[95] A local law may be in verbal conflict and yet be sustained under the functional test.[96]

   b. *Preemption*: Preemption of a field by a public general law so that local laws are prohibited can occur in two ways:

      1.) *Express Preemption*: A public general law contains an express denial of the right to enact local laws in a particular field;[97] or

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92. *See* County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975). The court's references to constitutional provisions that vested the General Assembly with the responsibility to regulate the manner of holding elections may indicate the court's underlying analysis. Although purporting to apply implied preemption by occupation, the court appears to have concluded that regulation of elections is a matter exclusively of state concern. For example, the court stated that "[t]hese constitutional provisions demonstrate that the framers of our Constitution contemplated that the regulation of elections would be the province of the State Legislature." 274 Md. at 60, 333 A.2d at 601. It seems the court reasoned through constitutional interpretation that regulation of elections is a state matter. The same conclusion could be reached with respect to education. *See* McCarthy v. Board of Education of Anne Arundel County, 280 Md. 634, 374 A.2d 1135 (1977).
93. Rossberg v. State, 111 Md. 394, 74 A. 581 (1909).
94. The rule is stated in City of Baltimore v. Sitnick, 254 Md. 303, 317, 255 A.2d 376, 382 (1969) but applied in Heubeck v. City of Baltimore, 205 Md. 203, 107 A.2d 99 (1954) and Levering v. Williams, 134 Md. 48, 106 A. 176 (1919).
95. *E.g.*, City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 376 (1969); State v. Brown, 142 Md. 27, 119 A. 684 (1922).
96. *Id.*
97. *See, e.g.*, MD. ANN. CODE art. 25A, § 5(S) (1973) ("provided, however, that no power to legislate shall be given with reference to licensing, regulating,

2.) *Implied Preemption*: A field is extensively occupied by public general laws so as to indicate impliedly the General Assembly's intent to reserve the field exclusively to itself.[98]

3. *Exclusive Local Concern*: Public general laws are prohibited where their subject matter involves a matter exclusively of local concern.[99]

The determination of whether a matter is a municipal affair or of statewide concern is made through constitutional interpretation[100] and, thus, this determination is a judicial function.[101] The only method to alter such a judicial determination is a subsequent reversal of the decision or a constitutional amendment. On the other hand, since the conflict and preemption doctrines are matters of statutory interpretation, the General Assembly is free to override any court decision. For example, an amendment to a public general law could expressly preempt a field held by the court to be open for "supplemental" local regulation,[102] or open a field to local legislation if the court were to find it impliedly preempted by occupation.

Under the *Rossberg* conflict rule, a local law could not (1) permit acts or conduct prohibited by public general law, or (2) prohibit acts or conduct permitted by public general law.[103] The second prong of the *Rossberg* rule was redefined by the court in *Sitnick,* which concluded that local laws cannot prohibit acts which are *expressly* permitted by public general law.[104] Unless there is an "express denial of the right to act by local authorit[ies]," the same field is open to "supplemental local regulation."[105]

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prohibiting or submitting to local option, the manufacture or sale of malt or spiritous liquors").

98. *See, e.g.*, McCarthy v. Board of Education of Anne Arundel County, 280 Md. 634, 374 A.2d 1135 (1977); County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975).

99. Few matters are exclusively of local concern. One example may be the basic structure of chartered county government. *See* Ritchmount Partnership v. Board of Sup'rs of Elections for Anne Arundel County, 283 Md. 48, 388 A.2d 523 (1978), in which the court of appeals characterized local government in Maryland as follows: "it can be seen that the power to *establish* and *organize* local government springs directly from Article XI-A and thus lies beyond the competence of the General Assembly or any other branch of state government to alter or erase." *Id.* at 59, 388 A.2d at 530 (emphasis in original).

100. *See* Ritchmount Partnership v. Board of Sup'rs of Elections for Anne Arundel County, 283 Md. 48, 388 A.2d 523 (1978).

101. Bishop v. City of San Jose, 1 Cal.3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969). The *Bishop* court stated that "the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." *Id.*

102. *E.g.*, City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 377 (1969).

103. See text accompanying note 54 *supra.*

104. See text accompanying note 66 *supra.*

105. *Id.*

Although *Sitnick* expanded local legislative power in one respect, it also contained the embryo of the preemption doctrine,[106] which has contracted the legislative power of chartered counties. There are two types of preemption, express and implied. Earlier cases[107] only focused on whether the public general law expressly denied local legislative power in a particular field or on a given subject. Utilizing *Sitnick's* dictum, a second prong of the preemption doctrine emerged — implied preemption by occupation. There is very little that can be synthesized from the cases espousing this principle.

The court in *County Council for Montgomery County v. Montgomery Association*[108] considered three factors important in determining whether a field was impliedly preempted by public general laws. First, constitutional provisions regarding elections indicated the framers' intent to confine regulation of elections exclusively to the General Assembly. Second, the General Assembly had enacted extensive legislation in the field. Third, dual regulatory schemes could possibly cause chaos. Only the first two factors were present in *McCarthy v. Board of Education of Anne Arundel County.*[109]

The court in *McCarthy* examined constitutional provisions; these provisions were a mandate to the General Assembly to establish a public school system. In addition, the court reviewed extensive legislation enacted by the General Assembly in the field. The court was not concerned, though, with a possible dual regulatory scheme in *McCarthy.* This factor, although important in the *Montgomery Association* case, is thus not controlling in the preemption doctrine. This is particularly true since the court of appeals upheld the local minimum wage ordinance in *Sitnick* notwithstanding a public general law regulating the same field and therefore presenting a dual regulatory scheme.

The first factor considered in *Montgomery Association* — constitutional provisions — was also present in *McCarthy.* The implied preemption prong prohibits local legislation because the field is already occupied by acts of the General Assembly. Constitutional provisions are irrelevant to this consideration and are more appropriately directed to an issue of whether the matter is exclusively of state or local concern. The only remaining factor present in both *Montgomery Association* and *McCarthy* is the presence of "extensive legislation" by the General Assembly in a particular field. Little else can be gleaned from both decisions. *McCarthy* lacked in-depth analysis; it merely reviewed constitutional and

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106. See text accompanying note 83 *supra.*
107. *E.g.,* City of Baltimore v. Stuyvesant Ins. Co., 226 Md. 379, 174 A.2d 153 (1961).
108. 274 Md. 52, 333 A.2d 596 (1975).
109. 280 Md. 634, 374 A.2d 1135 (1977).

statutory provisions, concluding that extensive legislation in the field of education demonstrated implied preemption by occupation. Thus, it appears the only guideline the court of appeals offers to chartered counties is that "extensive legislation" in a field impliedly preempts that field by occupation.

The doctrine of implied preemption by occupation has been addressed in other jurisdictions, notably California. The California courts state that the doctrine is premised on the superior authority of the state[110] and the need to prevent dual regulation that could result in uncertainty and confusion.[111] In addition, the invalidity of a local law "arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground."[112]

The test used by California courts to determine preemption by occupation is whether the state law was "intended" to occupy the entire field.[113] Factors to consider in determining an intention to confine a field exclusively to state legislation include the following:

(1) the statutory language;[114]

(2) whether the subject matter requires uniform treatment throughout the state;[115]

(3) whether provisions of the ordinance reveal duplication of the state law's function;[116]

(4) the whole purpose and scope of the legislative scheme,[117] such as failure of the state law to address various aspects of the field, or to use an "all inclusive" phrase,[118] and the extensive scope of statutory provisions;[119]

(5) the constant attention given to the subject by the state legislature;[120] and

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110. Abbott v. City of Los Angeles, 53 Cal.2d 674, 682, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).
111. *Id.*
112. Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 485 (1942).
113. *Id. See generally* Comment, *The California City* versus *Preemption by Implication,* 17 HASTINGS L.J. 603 (1966).
114. Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 485 (1942).
115. Tolman v. Underhill, 39 Cal.2d 708, 713, 249 P.2d 280, 283 (1952).
116. *See* Abbott v. City of Los Angeles, 53 Cal.2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).
117. Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280, 283 (1952).
118. *In re* Hubbard, 62 Cal.2d 119, 126, 396 P.2d 809, 813, 41 Cal. Rptr. 393, 397 (1964), *rev'd on other grounds,* 1 Cal.3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).
119. *See In re* Lane, 58 Cal.2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).
120. Lancaster v. Municipal Ct. for Beverly Hills Judicial Dist. of Los Angeles County, 6 Cal.3d 805, 808, 494 P.2d 681, 683, 100 Cal. Rptr. 609, 611 (1972).

(6) failure of the legislature expressly to allow local legislation by statute after a field is held to be impliedly preempted by occupation.[121]

The New Jersey courts also state that preemption of a legislative field by occupation is a question of the legislature's intent.[122] This intention must be clearly indicated, however.[123] The most important factor to New Jersey courts in determining preemption is whether the subject matter requires uniform treatment throughout the state.[124] Other factors include: (1) the scope of the statute;[125] (2) presence of a comprehensive state plan;[126] (3) legislative history,[127] and (4) whether the state and local laws have different purposes.[128]

California and New Jersey consider similar factors in determining preemption by occupation, *e.g.*, whether the subject matter requires uniform treatment throughout the state, whether the local law duplicates the state law's function, and the scope of the state statute. The Maryland cases, however, have focused primarily on the presence of extensive legislation in a particular field. This "statutory nose-count" approach to implied preemption has been severely criticized.[129]

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121. *Id.*
122. *E.g.*, Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969), in which the court stated the test as follows: "whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." *Id.* at 555, 251 A.2d at 764-65.
123. Kennedy v. City of Newark, 29 N.J. 178, 187, 148 A.2d 473, 478 (1959).
124. Ringlieb v. Township of Parsippany-Troy Hills, 59 N.J. 348, 283 A.2d 97 (1971); State v. Ulesky, 54 N.J. 26, 252 A.2d 720 (1969); Kendall Park Chapter of Deborah v. City of New Brunswick, 159 N.J. Super. 249, 387 A.2d 1214 (1978); Warren Park Estates, Inc. v. Township Comm. of Township of East Windsor, 136 N.J. Super. 180, 345 A.2d 346 (1975); Dimor, Inc. v. City of Passaic, 122 N.J. Super. 296, 300 A.2d 191 (1973); Coast Cigarette Sales, Inc. v. Mayor and City Council of Long Branch, 121 N.J. Super. 439, 297 A.2d 599 (1972).
125. Township of Chester v. Panicucci, 62 N.J. 94, 299 A.2d 385 (1973); Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969).
126. Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 293 A.2d 720 (1972), *aff'd*, 62 N.J. 521, 303 A.2d 298 (1973).
127. Borough of Paramus v. Martin Paint Stores, Inc., 121 N.J. Super. 595, 298 A.2d 294 (1972).
128. Mayor and Township Comm. of South Brunswick Township v. Covino, 142 N.J. Super. 493, 362 A.2d 51 (1976).
129. In Galvan v. Superior Ct. of City and County of San Francisco, 70 Cal.2d 851, 861, 452 P.2d 930, 937, 76 Cal. Rptr. 642, 649 (1969), the Supreme Court of California criticized the statutory nose-count approach:

> To approach the issue of preemption as a quantitative problem provides no guidance in determining whether the Legislature intends that local units shall not legislate concerning a particular subject, and further confounds a meaningful solution to preemption problems by offering a superficially attractive rule of preemption that requires only a statutory nose-count.

The emergence of implied preemption in Maryland poses perhaps the greatest threat to the legislative and home rule powers of chartered counties. As one commentator has appropriately stated, "[i]f an evil-minded judge were to set about to alter the forces of local-state governmental relations and strike terror in the hearts of local legislators, he should probably have arrived at the doctrine of implied preemption."[130] The implied preemption by occupation prong presents many problems of serious consequence to local legislators. First, the situations in which implied preemption by occupation will be applied are difficult to ascertain. Implied preemption by occupation has been applied in cases where express preemption could also be applied.[131] In other situations, the court could have invalidated local laws under the *Rossberg-Sitnick* conflict rule but instead foreclosed an entire legislative field as impliedly preempted by occupation.[132] Thus, chartered counties lack guidelines as to when implied preemption will be applied. Maryland courts are now presented with arguments based upon both the *Rossberg-Sitnick* conflict rule and the preemption doctrine.

Second, implied preemption by occupation presents a serious threat to local legislative power. Under this preemption prong, local legislation in an entire legislative field is precluded; on the other hand, the *Rossberg-Sitnick* conflict rule only invalidates a particular local ordinance that conflicts with a public general law. Even more significant is the possibility that chartered counties may be precluded from exercising an enumerated express power granted by Article 25A. The General Assembly is only prohibited from enacting a *public local law* on any subject covered by the express powers granted by Article 25A;[133] the General Assembly may enact *public general laws* in a particular field that embraces an Article 25A express power. If the court concludes that the field is impliedly preempted by occupation, then the General Assembly has altered the express powers, in effect repealing an express power, without amending Article 25A.[134]

Finally, implied preemption by occupation has created a guessing game for chartered counties as to their legislative powers. Tracing legislation to an enumerated express power, or even the

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130. Feiler, *Conflict Between State and Local Enactments — The Doctrine of Implied Preemption*, 2 URB. LAWYER 398, 398 (1970).
131. *E.g.*, McCarthy v. Board of Education for Anne Arundel County, 280 Md. 634, 374 A.2d 1135 (1977).
132. *Compare* County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975) *with* Abbott v. Administrative Hearing Bd., 33 Md. App. 681, 366 A.2d 756 (1976).
133. MD. CONST. art. XI-A, § 4.
134. *But see* State v. Stewart, 152 Md. 419, 424, 137 A. 39, 41-42 (1927). See text accompanying notes 17-22 *supra*.

general welfare clause, in Article 25A is insufficient to determine whether a chartered county has authority to legislate on a given subject or in a particular field. It is irrelevant under implied preemption whether a chartered county has legislative power to enact particular legislation.[135] In addition, local legislative power could very well expand and contract when a particular field is held to be impliedly preempted and the General Assembly later repeals public general laws in the field.

The court of appeals' opinions have failed to provide clear, certain guidance as to the method for determining the legislative fields open to local legislation. A leading commentator on municipal jurisprudence has stated that "[w]hen the legislature does not clearly indicate that it is occupying a well-defined field, courts should be most reluctant to invalidate county legislation"[136] as impliedly preempted by occupation. The mere presence of public general laws in a particular field should not necessarily deprive a chartered county of its legislative power in that field.[137] Moreover, the mere fact a public general law contains detailed and comprehensive regulation of a subject should not alone establish legislative intent to occupy the entire field to the exclusion of local legislation.[138]

Implied preemption cases often focus on whether the legislature intended to occupy the particular field. Determining intent may be a difficult and uncertain process:

> In searching for legislative "intent" to pre-empt a field, a court should keep clearly in mind the type of intent it can reasonably expect to discover. Surely a legislature does not ordinarily intend to invalidate the particular ordinance in question; indeed, the ordinance may not have existed at the time the statute was passed. It is unreasonable to expect, moreover, that the intent was specific enough to have been directed to a particular kind of ordinance. . . . Probably the closest approximation of intent possible, in the absence of contrary indication in the statute, is that any ordinance which substantially interferes with the effective functioning of the statute should be invalidated.[139]

Implied preemption, although necessary, should be applied infrequently and only to those public general laws "which the General

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135. *E.g.*, County Council for Montgomery County v. Montgomery Ass'n, 274 Md. 52, 333 A.2d 596 (1975). The court found "it unnecessary to decide whether the County Council otherwise had the authority to enact the election ordinances" once it concluded the field was impliedly preempted by occupation. *Id.* at 57, 333 A.2d at 599.
136. 4 C. ANTIEAU, LOCAL GOVERNMENT LAW § 31.09 (1966).
137. *See generally* 6 MCQUILLIN, *supra* note 3, at § 9.07.
138. See note 125 and accompanying text *supra*.
139. Note, 72 HARV. L. REV. 737, 745 (1959).

Assembly *clearly* intended to apply uniformly statewide."[140] The court of appeals should employ a more comprehensive test in determining implied preemption, examining some of the factors used by the California and New Jersey courts in their decisions.

IV. CONCLUSION

Consistent with the purpose behind Article XI-A, to provide the fullest measure of self-government to chartered counties, the Court of Appeals of Maryland has rendered opinions broadly interpreting local legislative power. For example, in *Montgomery Citizens League v. Greenhalgh,*[141] the court effectively rejected Dillon's Rule by interpreting Article 25A, section 5(S) as equivalent to the police power. In addition, other cases have similarly extended additional power to chartered counties, such as *County Council for Montgomery County v. Investors Funding Corp.,*[142] which held that chartered counties have the implied power to alter the English common law on matters covered by the enumerated express powers.

Counterbalancing the expansion of local legislative power has been the application of the conflict and preemption doctrines. It may appear that the additional power conferred upon chartered counties resulting from recent interpretations of the Express Powers Act has been withdrawn by the application of the conflict and preemption doctrines. Certain limitations, however, are necessary on chartered county legislative powers, and direction must be given chartered counties to avoid confrontations with legitimate legislation enacted by the General Assembly. Both the verbal and functional tests of the conflict rule serve as useful tools to invalidate local laws; at the same time, chartered counties can ascertain, to a reasonable degree of certainty, whether a local law will violate either test. Express preemption, although easy to determine, has been infrequently used.

Implied preemption by occupation, on the other hand, has emerged in the past few years. Implied preemption, although concededly necessary to prohibit local legislation in some fields, should be applied only where it is clearly obvious that public general laws alone should occupy a field.[143] Preemption of a field "may often be a major policy decision for which the legislature should, if possible, assume responsibility."[144] Frequent applications of implied

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140. Moser, *County Home Rule — Sharing The State's Legislative Power With Maryland Counties,* 28 MD. L. REV. 327, 349 (1968) (emphasis added).
141. 253 Md. 151, 252 A.2d 242 (1969).
142. 270 Md. 403, 312 A.2d 225 (1973).
143. Fields where it is obvious that the General Assembly intends to preempt include laws relating to partnerships, trusts, and domestic relations.
144. Note, 72 HARV. L. REV. 737, 746 (1959).

preemption will cause considerable uncertainty in chartered counties as to the extent of their legislative powers. The court of appeals, therefore, should be most cautious in applying the doctrine of implied preemption by occupation.

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